No. 86-857

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

ROMESH GULATI,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

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PETITIONER'S REPLY BRIEF

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Respondent attempts at length to defend the merits of the Minnesota Supreme Court's decision. However, he generally does not, and cannot, deny the existence of a sharp conflict among the state and federal courts over the extent to which the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151, *et seq.*, preempts state law claims arising out of employment disputes in the railroad and airline industries. Nor can Respondent deny that the issue in conflict is of great significance. The National Railway Labor Conference has emphasized the critical nature of this issue to the railroad industry in its brief as *Amicus Curiae* in Support of the Petition in this case, and the Teamsters for a Democratic Union have indicated rail-

way labor's agreement with this conclusion.[1] The issue affects vital interests of railroad and airline employers and employees throughout the Nation, yet the outcome of disputes that raise the issue depends on the section of the country in which the suit is brought.

1. Respondent's primary argument is that the Minnesota Supreme Court's decision is in harmony with decisions of several federal and state courts. Res. Br. at 3. This argument is correct, but it cuts in favor of, rather than against, a grant of certiorari. The reason is that—contrary to the Minnesota Supreme Court's decision—an even greater number of federal and state courts have rejected attempts by railway and airline employees to circumvent the RLA's exclusive and comprehensive dispute resolution process by casting their employment grievances in the form of state law claims. *See* Cert. Pet. at 14-16. Indeed, at nearly the same time that the Minnesota Supreme Court was concluding that a railway employee could challenge the merits of disciplinary proceedings brought against him by means of a complaint under state law for intentional infliction of emotional distress, the court in *Stephens* v. *Norfolk and Western Ry.*, 792 F.2d 576, 579 (6th Cir. 1986), was rejecting a similar claim:

> "Employees' attempts to evade NRAB exclusive jurisdiction over minor disputes by recharacterizing their claims into state causes of action are scrutinized by the following test: If the 'action is based on a matrix of facts which are inextricably intertwined with the grievance machinery of the collec-

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[1] *See* Brief for Teamsters for a Democratic Union and Public Citizen as *Amici Curiae* filed in *The Atchison, Topeka and Santa Fe Railway* v. *Buell*, No. 85-1140 at 7 (arguing that "case law on the displacement of [state] tort law by the Railway Labor Act" is in "disarray" and that this Court should not resolve that issue in *Buell* but "wait to address that question until it has been fully briefed and addressed by the parties in a case squarely presenting the issue").

> tive bargaining agreement and of the R.L.A.,' exclusive jurisdiction of the NRAB preempts the action. *Magnuson* v. *Burlington Northern, Inc.*, 576 F.2d 1367, 1369 (9th Cir. 1978), *cert. denied*, 439 U.S. 930, 99 S. Ct. 318, 58 L.Ed.2d 323 (1978). Pursuant to this standard, other circuits dismiss for lack of subject matter jurisdiction state court claims of reckless or intentional infliction of emotional distress arising directly out of a labor dispute. *See Beers* v. *Southern Pacific Transportation Co.*, 703 F.2d 425 (9th Cir. 1983); *Choate* v. *Louisville & Nashvlle Railroad Co.*, 715 F.2d 369 (7th Cir. 1983)."

Very simply, the approach and the holding in this case cannot be reconciled with the rule followed in other cases that "if the action is based on a matrix of facts which are inextricably intertwined with the grievance machinery of the collective bargaining agreement and of the RLA, exclusive jurisdiction of the NRAB preempts the action." [2] Significantly, Respondent does not even attempt such a reconciliation.

Respondent attempts to distinguish the cases cited by Petitioner by arguing that, unlike this case, they do not involve claims for intentional infliction of emotional distress for which the RLA allegedly provides no remedy. Respondents' claim is without merit for at least three reasons. First, at least four circuits have held that claims for intentional infliction of emotional distress are

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[2] Respondent claims that his allegations in this case "have no connection to . . . any . . . possible subject of a grievance under the collective agreement." Res. Br. at 10. This contention is plainly erroneous. For example, Rule 35 of the collective bargaining agreement provides detailed procedures for "a fair and impartial investigation" in employee disciplinary proceedings. Pet. App. 48a-49a. Respondent's claim here that the disciplinary proceedings brought against him were improper is thus "inextricably intertwined with the grievance machinery of the collective bargaining agreement."

preempted by the RLA.[3] Second, contrary to Respondent's claim, the grievance procedures provided under the RLA do provide a remedy—although different from that available under state tort law—to an employee who claims to have been subject to a pattern of harassment by his supervisor or co-workers.[4] Third, and in any event, this Court has made clear that a state claim otherwise preempted under federal law is not revived by the fact that the remedies available under federal law differ in kind or scope from those potentially available under state law. *See Local 926, International Union of Operating Engineers, AFL, CIO* v. *Jones*, 460 U.S. 669, 684 (1983); *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 246-47 (1959).

2. Respondent also argues at length that the Minnesota Supreme Court's decision here is consistent with the decision in *Farmer* v. *United Brotherhood of Carpenters and Joiners of America, Local 25*, 430 U.S. 290 (1977), in which this Court held that the National

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[3] *See, e.g., Adkins* v. *Chesapeake & O. Ry.*, No. 85-1204 (4th Cir., Oct. 3, 1985), *pet. for cert. pending*, No. 85-1099; *Antalek* v. *Norfolk and Western Ry.*, No. 84-3057 (6th Cir., Aug. 30, 1984); *Choate* v. *Louisville & N.R.R.*, 715 F.2d 369 (7th Cir. 1983); *Beers* v. *Southern Pacific Transp. Co.*, 703 F.2d 425 (9th Cir. 1983); *Magnuson* v. *Burlington Northern, Inc.*, 576 F.2d 1367, 1369 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978). The decisions in *Adkins* and *Antalek* are unpublished but were reproduced in the appendix to the Petition for a Writ of Certiorari in *The Atchison, Topeka and Santa Fe Railway* v. *Buell*, No. 85-1140.

[4] It is commonplace for adjustment boards to entertain claims by employees that they have been subject to harassment by their employers. *See, e.g., UTU* v. *Baltimore & Ohio R. Co.*, Award No. 360 (Public Law Board No. 1312, March 26, 1979) (stating that the union acting on behalf of its members "has heretofore successfully demonstrated that it is quite competent to handle grievances of proven harassment"); *BRAC* v. *Southern Pacific Transp. Co.*, Award No. 31 (Public Law Board No. 1946, July 8, 1980); *Brotherhood Railway Carmen* v. *Washington Terminal Co.*, Award No. 8481 (NRAB Second Div., October 29, 1980). *See also* cases cited in Brief of National Railway Labor Conference as *Amicus Curiae* at 9 n.4.

Labor Relations Act ("NLRA") did not preempt an employee's claim for intentional infliction of emotional distress against his union.[5] Res. Br. at 11-15. Respondent again, however, ignores the fact that, in applying *Farmer* to this case, the Minnesota Supreme Court's opinion conflicts with the decisions of numerous federal and state courts which have declined to apply the *Farmer* rationale to claims subject to RLA grievance procedures.[6] These courts have reasoned that because the RLA creates a comprehensive scheme for redressing employment disputes, "preemption of state law claims [under that Act is] more complete" than preemption under the NLRA (which merely protects and prohibits certain conduct). *Peterson* v. *Air Line Pilots Ass'n International*, 759 F.2d at 1169. Respondent does not, and cannot, deny that, in applying *Farmer* to this case, the Minnesota Supreme Court's opinion conflicts with these decisions. He simply ignores them.

3. Finally, Respondent argues that "the Minnesota Supreme Court's opinion is in fact *in full conformity* with a number of federal circuits which have held infliction of emotional distress to be *independent* of any claim under the FELA." Res. Br. at 17 (emphasis in original). This argument overlooks the two decisions relied upon by the dissenting justice in the decision below

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[5] Because *Farmer* involved a claim by an employee against his union, that claim plainly was not covered by any arbitration clause of a collective bargaining agreement between the union and the employer, nor by a statute, such as the RLA, which imposes mandatory and comprehensive grievance resolution procedures.

[6] *See, e.g., Peterson* v. *Air Line Pilots Ass'n International*, 759 F.2d 1161, 1168-69 and n.18 (4th Cir.), *cert. denied*, 106 S. Ct. 312 (1985); *Jackson* v. *Consolidated Rail Corp.*, 717 F.2d 1045, 1051-54 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *Magnuson* v. *Burlington Northern, Inc.*, 576 F.2d 1367, 1369-70 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978); *Koehler* v. *Illinois Central Gulf R.R.*, 109 Ill. 2d 473, 488 N.E.2d 542, 545 (1985), *cert. denied*, 106 S. Ct 3297 (1986).

(Pet. App. 26a-27a), who, applying *Buell* v. *Atchison, Topeka & Santa Fe Railway Co.*, 771 F.2d 1320 (9th Cir. 1985), *cert. granted*, No. 85-1140, and *Lancaster* v. *Norfolk & Western Ry.*, 773 F.2d 807, 818 (7th Cir. 1985), *pet. for cert. pending*, 85-1702, concluded that Respondent's claims were preempted by the FELA. The majority of the Minnesota Supreme Court declined to follow the holding in *Buell* that a claim for infliction of emotional distress is cognizable under the FELA, finding "[s]uch a holding [to be] very much in the minority." Pet. App. 21a n.7. The decision below thus conflicts with *Buell* and, at a minimum, should be held pending resolution of that case by this Court.

CONCLUSION

The petition for a writ of certiorari to review the judgment of the Minnesota Supreme Court should be granted. Alternatively, the Court should retain this case on its docket pending decision on the merits of No. 85-1140.

Respectfully submitted,

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